IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.1439 OF 2006

Ishwar R.Gidwani ..Petitioner

Vs.

The Competent Authority and Ors ..Respondents

Mr.A.S.Dhakephalkar i/b Mr.A.S.Rao for the petitioner

Mr.H.V.Mehta for the respondent nos.1 and 2

Mrs.A.S.Pai, A.P.P. for the state

CORAM : J.N.PATEL &
SMT.ROSHAN S.DALVI, JJ.

DATED : 25TH SEPTEMBER, 2006

RESERVED ON : 18/09/2006

PRONOUNCED ON : 25/09/2006

ORAL JUDGMENT (PER J.N.PATEL, J):

1. Rule, returnable forthwith. The learned counsel for the respondents waives service. By consent, heard the learned counsel for the parties.

2. The petitioner has impugned the order

dt.4.8.04 passed by the competent authority, so also the order dt.14.6.06 passed by the appellate tribunal and the proceedings initiated under section 7 and 19 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short SAFEM (FOP) Act). The petitioner has sought Writ of certiorari and declaration that the impugned orders be held as null and void and the same be quashed and set aside.

3. The facts leading to the initiation of the proceedings can be summed up as under:

4. The petitioner was ordered to be detained under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) vide order dt.1.6.94 issued by the Government of India, New Delhi. The order could not be executed for the reasons that the petitioner was found to be absconding, the investigating agency i.e.the Enforcement Directorate initiated action against the relatives of the detenu i.e. the petitioner about the properties of the detenu in their possession and

occupation. The authorities found that the detenu had a flat in the name of his mother Mrs.Gomtan R.Gidwani and a shop block. The competent authority, thereafter commenced the enquiry of the properties of the petitioner and his relatives by calling for information from the concerned person of the society and on the basis of the information collected, on 9.10.01 a show cause notice under section 6(1) of the SAFEM (FOP) ACT, 1976 was issued by the Competent Authority to the petitioner, his wife Smt.Maya L.Gidwani and his mother Smt.Gomtan R.Gidwani in respect of immovable properties i.e. C-30, Elco Arcade, 46, Hill Road, Bandra, Mumbai 400 050 held by the petitioner in which business is being conducted in the name and style of M/s.National Saree Centre and so also the residential property i.e. flat at 13th floor, Kendwell Building, Sitladevi temple Road, Mahim, Mumbai - 16 in the name of his mother.

5. The Competent Authority after giving sufficient opportunity of hearing to the petitioner’s relatives passed the impugned order dt.4.8.04 in which it held that the properties in

question belongs to the petitioner and declared that the properties have been illegally acquired properties by the petitioner within the meaning of section 3 of SAFEMA and ordered forfeiture of the two properties namely;

1. Residential Flat bearing no.13, 3rd floor, Kendwell Bldg., Sitladevi Temple Road, Mahim, Mumbai - 16 alongwith the furniture and fixtures therein.

2. Business Premises in the name & style of M/s.National Saree Centre, 30, Elco Arcade, 46, Hill Road, Bandra, Mumbai - 400 050, alongwith the premises, assets and goodwill therein.

6. Being aggrieved by the impugned order passed by the Competent Authority, the petitioner and his mother Smt.Gomtan R.Gidwani preferred an appeal before the appellate tribunal for forfeited property, New Delhi under section 12 of the SAFEM

(FOP) Act, 1976. The appellate tribunal vide his order dt.14.6.06 dismissed both the appeals preferred by the petitioner and his mother.

7. These orders are challenged on various grounds but mainly on the ground of inordinate delay in issuance of show cause notice on 9.10.01 when according to the petitioner, there was an express prohibition to initiate any proceedings in respect of any properties of value less than Rs.1 lakh held by the alleged affected persons to whom SAFEM (FOP) Act, 1976, is applicable by way of guidelines issued by Shri O.P.Ahuja, the then Under Secretary to Govt. of India, Ministry of Finance, Dept. of Revenue, New Delhi to all the Competent Authorities vide his communication vide No.F.No.12(33)/93-CA dt.23.6.1994 and therefore, for want of Jurisdiction such initiation of proceedings is initiated. Further, that the authorities having not taken into consideration the inordinate and unexplained delay for issuing show cause notice by itself vitiates the entire proceedings.

8. Another contention is relating to the provision of SAFEM (FOP) Act being not applicable to cases where the detention order has not been upheld by the court of law and that the respondent competent authority had not taken into consideration that the properties do not belong to the petitioner detenu but belongs to his mother and wife and had no nexus with the illegal activities of the petitioner prior to the year 1994 and that the petitioner's wife and mother have placed before the authorities sufficient material to show that the properties in question are acquired by them from their own resources and owned by them in their individual capacity.

9. Mr.Dhakephalkar, the learned counsel for the petitioner submitted that the inordinate and unexplained delay for such a substantial period itself vitiates the proceedings as not only it deprives the persons affected by the impugned order of a fair opportunity but also makes it impossible for them to obtain relevant documents and record to support their case and, therefore, whatever material has been placed before the Competent

Authority to show that the properties in question have been acquired by the wife and mother of the detenu out of their own independent income and legal sources ought to have been accepted.

10. The learned counsel for the petitioner further contended that the Competent Authority as well as the appellate authority did not take into consideration the various submissions made before them and has summarily rejected the claim of the petitioner's wife and mother to the properties in question and came to an erroneous conclusion that the properties have been acquired from illegal sources i.e. alleged nefarious activities of the petitioner.

11. The learned counsel for the petitioner also emphasised that the competent authority did not give an effective and reasonable opportunity to the petitioner as well as his mother prior to the passing of forfeiture order and the appellate authority also failed to take into consideration their submission.

12. The learned counsel for the petitioner submitted that both the authorities have passed the orders ignoring the judicial pronouncements governing the issues raised by the petitioner and his mother and, therefore, the order deserves to be quashed and set aside.

13. Mr.Mehta, the learned counsel appearing on behalf of the respondents submitted that in so far as the issue of inordinate delay in issuing show cause notice is concerned, the respondents cannot be blamed for the same as the petitioner himself on coming to know that the order of detention has been passed against him, has made himself scarce and that efforts were made to search him as he was found to be absconding and it is thereafter that the authorities decided to proceed in the matter and issue show cause notices to the petitioner's mother and petitioner which were received by his wife Smt.Maya I.Gidwani and that the period from the time of issuing show cause notice till the competent authority passed the orders was spent in giving repeated opportunities to them which can be seen from the records and proceedings, as it is the

petitioner's wife and mother who sought repeated opportunities and adjournments to place on record the documents and file submissions on their behalf to justify their claim that they have purchased and own two properties in question through legal sources and from their own income and that the petitioner has no concern whatsoever with it.

14. Mr.Mehta, the learned counsel for the respondents further submitted that the contention of the learned counsel for the petitioner that unless and until the detention order passed under COFEPOSA is scrutinised and adjudicated by the court of law, it cannot be taken into consideration for initiating proceedings under SAFEM (FOP) Act, 1976, is unsustainable from the fact that the petitioner was found to have absconded and his whereabouts are not known is sufficient enough to initiate proceedings under SAFEM (FOP) Act and, therefore, the Competent Authority did not commit any error legally in issuing show cause notice and after giving fair opportunity to the petitioner i.e. his wife and mother passed the order dt.4.8.04.

15. Mr.Mehta, the learned counsel for the respondents submitted that on perusal of the order passed by the competent authority, it is seen that the competent authority has considered in detail all the documents, submissions and authorities cited before the competent authority by the petitioner’s relatives.

16. Mr.Mehta, the learned counsel for the respondents submitted that the appellate tribunal after hearing the petitioner through his wife has upheld the order and the petitioner has not been able to show as to how the finding of the competent authority and appellate tribunal relating to the facts of the case that the two properties actually belong to the petitioner can be said to be erroneous and illegal.

17. Mr.Mehta, the learned counsel for the respondents submitted that in view of the concurrent finding of facts, this court in writ jurisdiction has very limited scope to examine impugned orders and, unless, the orders are found

to be perverse or suffer from error apparent on the face of the record, no interference is called.

18. Mr.Mehta also pointed out to this court that the petitioner has gone underground and is proclaimed as absconder and therefore, cannot be heard unless he surrenders before the Executing Authority in compliance with the detention order. The petitioner having failed to challenge the detention order, therefore, cannot be heard in the matter as the impugned orders are not challenged by wife and the mother of the detenu in their individual capacity and therefore, the petition deserves to be dismissed.

19. We have given our anxious and thoughtful consideration to the rival contentions made before us. As rightly submitted by Mr.Mehta, the learned counsel for the respondents, the petitioner can be dismissed on the preliminary issue of its maintainability as the petition is filed by the detenu who is proclaimed to be an absconder but even if the two orders i.e. the order passed by the competent authority on 4.8.04 which has been

upheld by the appellate tribunal on 14.6.06 are examined, this court finds that the authorities below had considered the case put forth by the wife and mother of the detenu in the light of the authorities on which reliance was placed in support of their case. In so far as business premises in the name and style of M/s,.National Saree Centre is concerned, the material placed before the competent authority itself shows that the property has been acquired for a consideration of Rs.12000/- jointly in the name of the petitioner and one Balumal Jamandas Batra out of the funds given by the father of the detenu. If that was so, we fail to understand how and in what manner the said Balumal Jamandas Batra transferred his rights in favour of the petitioner and the contention of the petitioner that the share of Balumal J.Batra was settled by the father of the detenu who has paid the money out of his own sources is not supported by any document. Therefore, the competent authority was justified in arriving at the conclusion that the said property in question was acquired by the petitioner out of the illegal income generated through his nefarious activities for which he has

ordered to be detained under COFEPOSA. In the case of **Kesar Devi Vs. Union of India & Ors. 2003 (89) ECC 7 (SC),** the Supreme Court while dealing with a similar situation held as under:

> "There is no requirement on the part of the competent authority to mention or establish any nexus or link between the money of the convict or detenu and the property sought to be forfeited under the Scheme of the Act - It is almost impossible to show that the property was purchased or acquired from the money provided by the convict or detenu - Appellant the wife of the detenu has failed to establish that she had any income of her own to acquire the three properties - No other inference was possible except that it was done so with the money provided by her husband, hence forfeiture justified. Under the Scheme of the Act, there is no requirement on the part of the competent authority to mention or establish any nexus or link between the money of the convict or detenu and the property sought to be forfeited. In fact, if such a condition is imposed, the very purpose of enacting SAFEMA would be frustrated, as in many cases it would be almost impossible to show that the property was purchased or acquired from the money provided by the convict or detenu. The notice clearly records the reasons for belief and, therefore, it fully complies with the requirement of law and there is no infirmity in the same. No merit in the appeal and the same is hereby dismissed."

20. In so far as other property is concerned which is claimed by the mother as she has not preferred any appeal against the impugned orders,

the findings of the competent authority and appellate authority have gone unchallenged and, therefore, in that respect do not call for any interference. Even otherwise Smt.Gomtan Gidwani has not been able to place on record any credible evidence before the competent authority to show that the said property was acquired by her from legitimate sources. The only documents on which reliance was placed is the copy of the letter dt.28.10.70 purported to be sent by late Mr.Khemchand Dariyanand of having given a gift of Rs.10000 to her niece i.e. Smt.Gomtan Gidwani out of love and affection. Therefore, the Competent authority was justified in negating her claim based on affidavit, copy of licence and letter dt.28.10.70. Therefore, we find that there is no merits in the petition and deserves to be dismissed. Rule discharged.

21. The learned counsel for the petitioner submits that the interim order protecting the petitioner be extended for a period of 4 weeks. We do not think that any case is made out for grant of such relief. The prayer for grant of stay to the

judgment and order wherein we have dismissed the petition is rejected.

(SHRI J.N. PATEL, J)

(SMT.ROSHAN DALVI, J)